

European Commission
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Consultation (Broadcasting)
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Response of the three Swedish Public Service Broadcasters, Sveriges Radio AB, Sveriges Television AB and Sveriges Utbildningsradio AB to the draft Broadcasting Communication of the European Commission

The three Swedish Public Service Broadcasters, hereunder referred to as the Swedish PSBs, welcome the opportunity to comment on the draft Broadcasting Communication of the European Commission.

The Swedish PSBs consider the present Broadcasting Communication (2001/C 320/04) to convey the principles for the application of the State Aid rules to public service broadcasting in a way that makes the need for a revision of the Broadcasting Communication limited. The future Communication should, in our view, remain on a more general level than the draft Communication does. The amendments to the present Communication, proposed in the draft, appear to serve the purpose of introducing a harmonized code of conduct for the Member States concerning the public service media in their territory, which, in our view, is clearly objectionable in an area where the Treaty assigns the Member States competence to decide on the services, within the limits of common interest. We believe that the future development of the public service media in the European countries is best guided by the administrative institutions and the constitutional law of each member state, monitored by the European Commission for manifest errors.

The remit of the public service media should, according to the Treaty, reflect the society it is to serve and shall therefore be defined in relation to the democratic, social and cultural needs in that society and as a guarantor of cultural diversity. The remit shall therefore not be made dependent on present or potential services on the market.

The mission of the public service media shall further be assessed in relation to the content of the services and not by the way they are funded or by the technical solution through which they are made available to the public.

While recognizing the specificities of the public service broadcasting in each country and the competence of the Member States to define, organize and provide for the funding of such broadcasting, the draft Communication adequately defines the task of the Commission to check for manifest errors in the conduct of the member state. In an effort to prevent errors the Commission, however, proposes, inappropriately in our view, methods that Member States should implement in their assessment of the PSB remit.

The discretion of the Member States to define, organize and provide for the funding of public service media may not be limited by means of procedural obligations imposed by the Commission. Great care should be taken in omitting such obligations from the draft, all the more so because a communication from the Commission would not be a proper instrument for imposing on the Member States any binding rules not previously covered in EC Law.

Following the viewers and listeners to new technical platforms, the Public Service Broadcasting is evolving to Public Service Media. This is a gradual process that engages the undertakings entrusted with the public mission, the authorities of the member state in charge of conferring and defining the mission as well as those responsible for monitoring the activities of the undertakings. The Swedish PSBs wish to recall that services always will continue to evolve so as to respond to changes in the cultural and social needs and technological developments in each Member State. It is the responsibility of each Member State to define the remit as an undivided whole and, when deemed necessary, to adapt it to these changes. Every attempt by the Commission to pre-define some aspects of the remit as subject to particular judgment would go against the general principle of subsidiarity and in particular the Amsterdam Protocol.

At the outset, the Commission argues for the present revision of the Broadcasting Communication by reference to changes in the environment in which the PSB organizations work and to the changes in the remit of these organizations triggered by the social and technical development. The additions proposed by the Commission deal, however, to a large extent not with the adaptation of the remit but rather focus on new services, thus following the line of reasoning behind the model introduced in the UK as a solution to the specific regulatory problem concerning the competences of the then newly established BBC Trust and the Ofcom. While the UK model may serve the British public perfectly well, it should be observed that other ways of adapting the PSBs remit to the changes in the environment may be better in other settings.

In Sweden the public service remit is regularly adapted to the changes in the Swedish society in a way that leaves no need for such procedural safeguards the Commission proposes in the draft:

- Ahead of each charter period of 4-6 years, on the initiative of the Swedish government a comprehensive review of the remit and of the needs to adapt it to present and expected changes in the social, cultural and technical environment is carried out.

- In the course of the review process, all the stakeholders and representatives of various interested parties are invited to contribute to the evaluation of the remit.
- The review report (Green Book) is put under debate, and a great number of authorities, NGOs, experts, media researchers and all stakeholders are invited to comment the report.
- Fully transparent parliamentary proceedings ensue, resulting in a White Paper on the guidelines for the forthcoming Charter.
- A Charter is issued by the government, with detailed objectives for the activities. The Charter, based on the Radio and Television Act and the Parliamentary Decision, constitutes the legal base for the activities of the Swedish PSBs.
- The Swedish PSBs publish their long term plan for the Charter period, in which they spell out how the goals and obligations expressed in the Charter will be met. The Department of Culture and the Swedish Broadcasting Commission receive the plan for information.
- The PSBs annually publish a detailed account of their public service activities and their relationship to the obligations put forward in the official steering documents.
- The Swedish Broadcasting Commission monitors the fulfillment of the public service remit, continually by assessing complaints concerning alleged breach against regulation, and annually by assessing the Public Service Account of each of the three public service broadcasters so as to conclude whether the activities during the year and over the Charter period as a whole correspond to the obligations laid down in the official steering documents.
- The Parliament annually decides on the funding of the public service broadcasting through an appropriation from the PSB Account. The conditions for the use of the appropriation are annually specified by the government. Both the level of the appropriation and the conditions for its use are normally foreseeable over the whole Charter period but, nevertheless, subject to annual government approval.
- All significant changes during a charter period in the activities of the PSBs, such as new services, are subject to government approval. A government decision in such a matter would, according to the Swedish administrative tradition, be taken after hearing all interested parties.

The Commission's focus on the assessment of "significant new services", as if they could be evaluated detached from the remit as a whole, seems to lead the Commission astray. In stead of confining itself to the task assigned to it in the Community law – checking for manifest error – the Commission proposes obligations for the Member States that infringe on their discretion in designing the method for the revision of the PSB remit. We fail to find legal grounds for the proposed obligations, and we note that the Commission abstains from a discussion of sanctions that might ensue if a member state disregards the obligations proposed.

The procedural safeguards in the form of *ex ante* assessment of new services proposed in the section 6.1.3 of the draft should be omitted as they, at least in a Swedish perspective, seem both intrusive and irrelevant. A further argument against such procedures would be the administrative costs they would incur.

The Commission suggests in pp 69 and 106 that Member States should have a supervisory body with sanctioning powers. This seems to infringe on the Member States' institutional autonomy and should be rephrased in respect for the Member States' discretion either to place both supervision and sanction on one single authority or on separate authorities..

The Swedish PSBs find the discussion in section 6.1.2. of a possible pay element in a public media service speculative rather than clarifying. It should be recalled that it is the member state's responsibility to define the composition of the public service remit and to decide how the various elements should be financed – in respect of the national competition law. The section as a whole, and p 54 in particular, fail to make it understandable on what grounds certain appreciated programs should be banned from the public service media. To our best judgment these matters are best dealt with in national settings. The rather nebulous discussion in pp 51-55 of the draft should be replaced by the concise formulations in pp 34 and 35 of the Communication 2001, which cover well what needs to be said about the adaptation of the remit to market developments.

The p 101 is a useful caveat of the market distortion aspect, whereas p 102 – concerning acquisition of premium content for back-log only and constantly over-bidding commercial competitors for premium rights - deals with problems that appear totally alien to the economic conditions the Swedish PSBs work under.

To conclude, the Swedish PSBs abstain from a detailed analysis of the draft Broadcasting Communication and, in stead, refer to the comments put forward by the EBU. In general terms we find the present draft Communication to lack in respect for the competence of the Member States to define, organize and provide for the funding of the public service broadcasting. We therefore encourage the Commission to work over the draft and consult all interested parties with a new draft that expresses the principal guidelines and interpretations of the Community law concerning public service broadcasting.

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